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No. 94-1926

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1995

GOPAL KAPOOR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the element of materiality in a prosecution for perjury under 18 U.S.C. 1623 must be submitted to the jury.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 23-28) is unpublished, but the judgment is noted at 54 F.3d 765 (Table).

JURISDICTION

The judgment of the court of appeals was entered on April 6, 1995. The petition for a writ of certiorari was filed on May 24, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on one count of perjury, in

violation of 18 U.S.C. 1623. He was sentenced to five months' imprisonment, to be followed by two years' supervised release. The court of appeals affirmed. Pet. App. 23-28.

1. On November 7, 1991, petitioner was arrested by Secret Service agents for allegedly committing credit card fraud while employed by A.P. Tours & Travel Ltd. During questioning while in custody, petitioner signed a Secret Service form, labeled an "Affidavit," that contained preprinted language acknowledging that petitioner had been informed of certain rights, including his right to consult an attorney. The form also contained a handwritten section, completed by one of the agents, that purported to be an admission by petitioner that he had purchased airline tickets using "unauthorized approval codes" for his personal credit cards. Pet. App. 24.

The government did not prosecute petitioner for credit card fraud. He was named as a defendant, however, in a related civil action filed by Air-India in federal district court. At a hearing held on October 21, 1993, in connection with a discovery motion in that case, petitioner testified about his possession, control, and knowledge of certain requested documents. In answer to questions asked by the district judge, petitioner denied, contrary to his signed statement, that he had told Secret Service agents he had used unauthorized approval codes. He also testified that he had never been advised of his right to consult with an attorney before making his statement to the Secret Service. Pet. App. 24-25; Gov't C.A. Br. 6-8.

Petitioner was later indicted on two counts of perjury. One count was based on his denial of having admitted to using unauthorized access codes. The other was based on his denial of having been informed

of his right to consult with an attorney. At trial, before submitting the case to the jury, the district court determined, as a matter of law, that each of the allegedly false statements was material to the purpose of the October 21 hearing. Pet. App. 25; Gov't C.A. Br. 12. The jury acquitted petitioner on Count One of the indictment and found him guilty on Count Two. Pet. App. 25.

2. In the court of appeals, petitioner argued, *inter alia*, that the district court erred in deciding the materiality issue as a matter of law instead of submitting the question to the jury. The court of appeals rejected that argument, holding in accord with "well-established precedent" that the issue of materiality in a perjury prosecution is properly determined by the court as a matter of law. Pet. App. 26-27.

ARGUMENT

Petitioner renews his contention (Pet. 12-21) that the question of materiality in a perjury prosecution under 18 U.S.C. 1623 must be submitted to the jury. In *United States* v. *Gaudin*, No. 94-514 (June 19, 1995), which was pending when the petition in this case was filed, this Court held that the element of materiality in a prosecution for false statements under 18 U.S.C. 1001 must be submitted to the jury. In light of the Court's reasoning that it is a violation of the defendant's Fifth and Sixth Amendment rights for an essential element of an offense to be withheld from the jury, that holding should apply equally to the element of materiality in a perjury prosecution under 18 U.S.C. 1623.

The government argued alternatively in the court of appeals that if it was error for the court to decide

the issue, the error was harmless. Gov't C.A. Br. 26 n.*. Because the court of appeals found no error in the district court's failure to submit the issue to the jury, it did not reach the question of harmless error. We therefore suggest that the Court remand this case to the court of appeals for reconsideration in light of the decision in *Gaudin* and for consideration of the question whether any error was harmless.

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment vacated, and the case remanded for reconsideration in light of this Court's decision in *United States* v. *Gaudin*, No. 94-514 (June 19, 1995).

Respectfully submitted.

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